No. 2570

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation; CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a corporation; J. E. WOODS, and M. I. CHAPPELL,

Plaintiffs in Error,

v.

DAVID CLEMENT, as Administrator of the Estate of DAVID CLEMENT, Jr., Deceased.

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Montana

BURTON K. WHEELER,
A. A. GRORUD,
H. G. MURPHY,
Counsel for Defendant in Error.

No. 2570

United States

Circuit Court of Appeals

For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation; CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a corporation; J. E. WOODS, and M. I. CHAPPELL,

Plaintiffs in Error,

v.

DAVID CLEMENT, as Administrator of the Estate of DAVID CLEMENT, Jr., Deceased.

Defendant in Error.

Brief of Defendant in Error

STATEMENT OF THE CASE.

A reading of the statement of the case contained in the brief of plaintiffs in error discloses an omission which we deem of such importance that we supply it here: On page 2 of said brief, plaintiffs in error have omitted from the recital of the issues the allegations contained in the amended bill of complaint to the effect that the Clement boy (the deceased) was, after

the engine was run into the wagon in which he then was, dragged by the engine over and along the railroad track for a great distance and was drawn and dragged under the wheels of said engine and the same was then and there run and driven over him whereby he was crusherd, maimed and injured and from which injuries he died. (Tr. p. 5.)

ARGUMENT.

For convenience we will reply to the brief of plaintiffs in error in the same manner as it is written, numbering the various subdivisions of our reply the same as they have their argument.

I.

The claim of plaintiffs in error that the amended complaint does not state facts sufficient to constitute a cause of action is one that deserves but little consideration, for two reasons, viz: 1. The demurrer interposed to the amended complaint, were, by the trial court overruled and plaintiffs in error given twenty days in which to answer, and that action by the trial court was "By consent of counsel." (Tr. p. 12); 2. The record is barren of any objection to the introduction of evidence at the beginning of the trial of the case. In view of these facts counsel for plaintiffs in error can not now seriously urge any objection which may have to the pleadings as they have voluntarily withdrawn their demurrers and proceeded with the trial of the cause upon the issues made by their denials. Objections of this character are seldom looked upon with favor

and if, with all reasonable deductions that can be drawn from a complaint, the facts alleged are sufficient to show a cause of action the pleading will be upheld.

Ditton v. Purcell, 21 N. D. 648; 132 N. W. 347.

However, we desire to comment briefly upon the argument of counsel for plaintiffs in error under this heading. They first state there is no allegation that the plaintiffs in error actually discovered the deceased in a place of peril, and cite the cases of Iowa Central Ry. Co. vs. Walker (8 C. C. A.) 203 Fed. 685 and Dahmer vs. N. P. Ry. Co., 42 Mont. 152, 136 Pac. 1059. These cases are ones in which the pleadings and facts are wholly different from the case under consideration.

In the case of Iowa Central Ry. Co. vs. Walker, *supra*, the allegations were that after the engineer discovered Walker in a place of peril, by the exercise of ordinary care, he (the engineer) could have avoided the injury. The Circuit Court of Appeals for the Eighth Circuit held: an instruction to be faulty, saying:

> "It submitted to the jury the question as to whether or not, in the exercise of diligence on the part of the engineer he could have discovered that the plaintiff was inside the danger limit."

and in that case is further given, as a reason for reversing the case and granting a new trial, the following:

> "At the close of all the evidence, defendant requested the court to instruct a verdict for the defendant, which was overruled, to which an exception was taken. As the evidence was indisputable and conclusive that, as soon as the engineer knew that plaintiff was in a situation of danger, he immediately did all that could be done to avoid the accident by applying the emergency brake, the requested instruction should have been given."

How a holding by an appellate court such as this sustains the contentions of plaintiffs in error under this heading is beyond our comprehension. Next considering the case of Dahmer vs. N. P. Ry. Co., *supra*, we find in the quotation therefrom the very words which we contend sustain the theory of our case. They are:

> "The duty imposed by it (the Doctrine of the Last Clear Chance) is, . . . , is to avert the injury after the perilous situation is actually discovered."

Bearing in mind the rule just quoted let us for a moment consider the allegations of paragraph VI. of the amended complaint (Tr., pp. 4-5) which are:

VI.

> "That on the morning of the 5th day of November, 1912, at about the hour of four o'clock, the said David Clement, Jr., was driving a pair of horses and riding in an enclosed milk-wagon, which was being drawn by said horses, going in a northerly direction on Montana Street, a public street in the incorporated city of Butte, Montana, toward and near the intersection of the defendant Chicago, Milwaukee and Puget Sound Railway Company's tracks and said Montana street (said crossing being near Greenwood Street in said city), and was not observant of the approach of a train which was running along said track in a westerly direction—the engine being under the control of the said J. E. Woods and said Chappel and being used at the time for switching purposes in the yards of the said Chicago, Milwaukee and Puget Sound Railway Company; that the said David Clement, Jr., was coming directly within the way of the said approaching train; *that the said engineer and the said Chappel did see the said David Clement, Jr., or*

by the exercise of ordinary care could have seen him, coming directly within the path of the said engine, and did see or by the exercise of reasonable care on their part, could have seen, that the said boy was in danger of being struck by the said engine, and that the boy was unobservant of the approach of said engine; that the defendants then, after so seeing the boy in danger, negligently and carelessly drove said engine against the vehicle in which the said David Clement, Jr., then and there was, without giving him any warning of the approach of said train and without lowering the gates which were at the said crossing, and by reason of the negligent management and operation of said engine, the said Clement boy was dragged by the same over and along the ground and over and along the railroad track for a great distance, and was drawn and dragged under the wheels of said engine, and the same was then and there run and driven over him, whereby he was crushed, maimed and injured, from which injuries he thereafter died." (Italics ours.) (Trans., pp. 4-5.)

The allegations of the amended complaint just quoted can hardly be said not to allege an actual discovery of the boy in a place of danger. The words used go further than is required by any of the authorities; it is stated that the engineer and foreman of the engine crew saw the boy coming into a place of danger without observing his danger and they "did see" that the boy was in danger of being struck and seeing him in such danger negligently and carelessly drove the engine against him, etc. Considering these allegations a little further it will be seen that it is charged that the engine was not only driven against the boy but it was so negligently managed and operated that he was dragged and drawn for a great distance over and along the ground and also drawn and dragged under the wheels of the engine and the engine was

run over him *whereby* he was crushed, maimed and injured, from which injuries he thereafter died. In other words not only the driving of the engine against the wagon containing the boy after he was discovered in a place of peril but it is also alleged that the dragging and drawing of him over the ground after the striking of the wagon caused the injuries of which he died. Counsel for plaintiffs in error seemingly overlook this last feature throughout their brief, and for that reason emphasis is laid upon those latter allegations, as defendant in error has always maintained that the injuries were inflicted not only at the time of the first impact between the engine and the wagon but also after the engine had drawn and dragged the wagon containing the boy over and along the ground and track, and when the wheels run over him.

The Doctrine of the Last Clear Chance has many times been the subject of decisions by the Supreme Court of Montana, and the following cases are some of them:

Neary v. N. P. Ry. Co., 37 Mont. 461; 97 Pac. 944.
Yergy v. H. L. & Ry. Co., 39 Mont. 213; 102 Pac. 310
Neary v. N. P. Ry. Co., 41 Mont. 480; 110 Pac. 226.
Dahmer v. N. P. Ry. Co., 48 Mont. 152; 136 Pac. 1059.
Melzner, Admr., v. N. P. Ry. Co., 46 Mont. 162; 127 Pac. 146.

This Court has very recently upheld this wholesome doctrine in the case of Great Northern Ry. Co. vs. Harman, 217 Fed. 959, where the court holds that a trespasser is entitled to the benefit of the doctrine, saying:

> "A cause of action arose in his favor, if the defendant actually knew of his peril and thereafter failed to exercise ordinary care to avoid injuring him; and the plaintiff's

contributory negligence cannot defeat the action, if it can be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of that negligence."

It is respectfully submitted that the allegations of the complaint are sufficient to state a cause of action.

II.

LEADING QUESTIONS TO WITNESSES.

It may be preliminarily observed under this heading that counsel for plaintiffs in error have not complied with Rule II. of this Court by failing to set forth the substance of the testimony objected to. This of itself should be sufficient reason for not considering the questions raised. However, we have taken the trouble to look back into the transcript for the purpose of ascertaining what answers were given to the questions which counsel call leading and which they claim were prejudicial to plaintiffs in error. The answers given to these questions were directly in accord with the testimony throughout the case, and consequently cannot be said to be prejudicial. Indeed, it is always within the discretion of the trial court to permit questions of that character and counsel wholly fails to show the slightest abuse of discretion on the part of the trial judge.

III.

CONCURRENT NEGLIGENCE.

Plaintiffs in error attempt under this heading to invoke the rule of concurrent negligence, but we respectfully submit that the rule of concurrent negligence has nothing to do in the con-

sideration of the case at bar. The complaint is based upon and the case was tried upon the theory of the Doctrine of the Last Clear Chance. It is alleged that the engineer and foreman of the engine crew discovered the deceased in a place of danger unobservant of the approaching train. (Tr., pp. 4-5.) The evidence introduced on the part of the plaintiff was abundant to show that the engineer and foreman did so see the deceased. The witness Willoughby testified: "This man who jumped off the engine when it was approaching the crossing I saw give a signal, of course, to the engineer (Tr., p. 29, ll. 4-6); "when I saw this man jump off the engine with a light, the head of the train was possibly forty, forty-five maybe fifty feet from the wagon." (Tr., p. 33, ll. 15-18.)

The witness Chappell testified: The milk wagon was 140 feet south of the crossing when I first saw it; I was on the engine about 340 feet from the crossing; I watched the wagon up to when I was about 150 or 200 feet from the crossing and then gave the engineer a slow signal to get his train under control; when I was 75 or 100 feet from the crossing I gave the engineer a positive signal to stop; I jumped off the engine when I was about 30 feet east of the crossing; the horses heads were then just coming on the track; the train was then going five or six miles an hour when it struck the wagon. (Tr., pp. 49-50; 61-64.)

The engineer, Woods, testified: I first saw the rig when I was about 200 feet from the crossing; they claim by measurement it was 300 feet; the wagon was about 175 feet from the crossing; when I saw there was a possibility that the driver would not stop his team I threw the air brake into emergency when I was 75 feet from the crossing and we hit

the wagon after that. (Tr., pp. 106-107.) I saw the team plainly from the time I first got past the house until it struck the track. I watched it all the time. I noticed that there were no efforts made by the person driving the team to get out of the way from the time I saw it until I struck it. (Tr., p. 110.)

The allegations as to the discovery of the deceased in a place of danger are ample and the evidence that he was so seen by the men in charge of the engine is uncontradicted.

In the case of Yergy v. Hel. L. & Ry. Co., 39 Mont. 213; 102 Pac. 310, which is a case on all fours with the case at bar, the Supreme Court of Montana said:

> "We shall assume for the purposes of this decision, that Mr. Yergy was negligent in placing himself in a situation of peril. It is not a violent inference that he was asleep in his buggy up to a moment just prior to the collision. The testimony of the motorman is, however, to the effect that he saw deceased, and appreciated his peril, when the car was 40 feet south of Lyndale Avenue. He then sounded the gong. Edgerton testified that the car was 50 to 100 feet from the crossing when the gong first sounded; while Bickel testified that he heard the sound when the car was 90 feet south of the crossing, and Mrs. Wise said she heard it when the car was 200 or 300 feet from the point of collision. Peterson testified that the speed of the car was 8 miles per hour, and plaintiff's testimony tended to show that, going at that rate of speed the car could have been stopped in the space of 20 feet. This testimony, which it was the right of the jury to believe, furnished ample basis for the application of the doctrine of last clear chance before the moment of collision."

The Supreme Court of Montana has passed upon the question of last clear chance many times.

Neary v. N. P. Ry. Co., 37 Mont. 461; 97 Pac. 944.
Neary v. N. P. Ry. Co., 41 Mont. 213; 110 Pac. 226.
Dahmer v. N. P. Ry. Co., 48 Mont. 152; 136 Pac. 1059, and also the decision on rehearing in the same case, 142 Pac. 209.
Melzner v. N. P. Ry. Co., 46 Mont. 162; 127 Pac. 146.

This court in the case of Great Northern Ry. Co. v. Harman, 217 Fed. 959, citing many excellent cases, held that the question as to whether or not the defendant had the last clear chance to avoid the accident was one for the jury. So in the case at bar the trial court was clearly right in allowing the case to go to the jury under the evidence and permit the jury to say whether or not under the circumstances of the case the plaintiffs in error had the last clear chance to prevent the accident. In the Yergy case, *supra*, the evidence was no stronger than the case at bar. There the evidence showed that the motorman saw the deceased at least 40 feet before he struck the buggy in which Yergy was riding and that the car could have been stopped within twenty feet. In the case under consideration the engineer himself says he saw the milk wagon two or three hundred feet before the collision occurred and that when the engine was seventy-five feet from the crossing he threw the air brakes into emergency. The evidence showed that the train could have been stopped, when traveling at the speed shown within a distance of fifteen feet (testimony of Groff, Trans., p. 85; testimony of Ury, Trans., p. 93). The witness Rainey said it could be stopped within thirty feet (Tr., p. 103). "This testimony," in the words of the Supreme Court of Montana last above quoted, "which it was the right of the jury to believe, furnished ample basis for the application of the doctrine of the last clear chance."

It seems to us that further argument of the doctrine of the last clear chance in this brief would be a work of supererogation. Your Honors have most carefully considered it before and have followed the rule and most properly applied it many times. The cases heretofore cited lucidly explain the rule, if indeed any explanation, in this enlightened age, is needed. The whole trouble with counsel for plaintiffs in error seems to be that they cannot differentiate between cases in which the doctrine was never invoked or when invoked not sustained by proof, and the cases in which this Circuit and the Supreme Court of Montana have carefully expressed the rule. In this connection we beg leave to call the attention of the Court to the fact that counsel for plaintiffs in error merely cite a mass of cases from other jurisdictions that are not applicable.

In closing this subdivision of our brief we trust we may be pardoned for citing one more case, but it is such a complete answer to the argument of counsel for plaintiffs in error that we call it to Your Honors' attention. It is:

> Teakle v. San Pedro L. A. & S. L. R. Co., 32 Utah 276; 90 Pac. 402; 10 L. R. A. (N. S.) 486.

In this case the facts were very similar to the case at bar; deceased was struck, fell under a car the engine was pushing and was crumpled up and crushed by the ash pan of the engine after the car passed over him. In commenting upon the claim put forth by the railroad company, the same as is done in this case, that the deceased's contributory negligence precluded a recovery, the Supreme Court of Utah held that the doctrine of last clear chance applied, saying:

"When the deceased was struck by the train and rendered helpless, the effect of his antecedent or contributory negligence was spent."

We will analyze some of the authorities we have been able to obtain and we are sure a careful reading of these authorities will disclose to Your Honors that in nearly every one, either the facts of the case did not sustain the doctrine of the last clear chance or that doctrine was not relied upon by the plaintiff claiming damages.

The first case cited, that of Dunworth v. Grand Trunk W. Ry. Co., 127 Fed. 307, 310, from the Seventh Circuit, the quotation made by plaintiffs in error plainly shows that the facts do not call for an application of the modification of the rule that contributory negligence is a bar to a recovery—the modification referred to being the doctrine of the last clear chance. Hence the citation is valueless in considering the case at bar.

The case of Southern Ry. Co. v. Carroll, (4th C. C. A.) 138 Fed. 638, is one in which the recovery was sought by reason of an alleged failure to comply with statutory requirements as to ringing the engine bell and blowing the whistle on approaching the crossing.

The case of Schofield v. Chicago Ry. Co., 114 U. S. 615, is one in which the negligence alleged was a collision on a crossing without a single element resembling the doctrine under consideration here.

The doctrine of the last clear chance is recognized in the case of Ill. Cent. Ry. Co. v. Ackerman, 144 Fed. 959, but the

evidence did not show that the employees of the railroad company ever saw deceased in a place of danger, hence the rule was held not to apply.

The deceased, for whose death the action was brought, in the case of C., M. & St. P. Ry. Co. v. Clarkson, 147 Fed. 397, was never seen by the engineer or brakeman on the train until after he had been struck. Indeed, the impact of the car with deceased caused the engineer to stop and it was found upon investigation that Clarkson was under the car, and no discovery in a place of peril was either alleged or proven.

The case of St. Louis & S. F. R. R. Co. v. Summers, 173 Fed. 358, expressly recognizes the doctrine of last clear chance but holds after summarizing the evidence, the following:

> "This evidence, and such evidence as this, is too vague and uncertain, especially when taken with that of the four other witnesses to the accident, which give no such account, to establish any state of peril on the part of Magar which would be reasonably observable by the engineer in charge of the train."

The evidence on which this holding was had is entirely different from that in the case at bar, as a most casual reading of the decision will demonstrate.

The case of Colorado & S. Ry. Co. v. Tucker, 173 Fed. 605, was not presented upon the theory of the last clear chance but upon failure to give signals.

Plaintiffs in error claim the case of Ill. Cent. R. Co. v. Nelson, 173 Fed. 915, to be strikingly parallel, and to show that it is state "there is, to be sure, no discovery of David Clement, Jr., in time or at all," and then they indulge in disparaging

remarks concerning the plaintiff's witnesses who testified as to the distance Woods could have stopped the train. They apparently overlook the testimony of Woods concerning David Clement, Jr., in a place of peril. Woods testified: "When I saw there was a possibility that the driver would not stop his team, why I threw the brake valve into emergency; I got the emergency into position about seventy-five feet from the crossing." (Tr., p. 107.) The jury at the trial having accepted the testimony of plaintiff's witnesses that Woods could have stopped the train within fifteen or thirty feet under the circumstances, the question is decided and not open to debate.

Yergy v. Hel. L. & Ry. Co., *supra.*

In the Nelson case, Henry, Nelson's decedent, was knocked prostrate with the impact of the engine, and the court said he might have been killed then, but David Clement, Jr., received only one wound that caused his death, to-wit, the crushing of the head; the first blood was found fifty feet or more from the crossing, the first members of the body ninety feet or more from the crossing and the body something over one hundred feet. The crushing out of the boy's life was when the wheel of a car passed over it ninety or one hundred feet from the crossing. How can such facts as we have in the case at bar make it one parallel with the Nelson case, *supra?*

Rather than further weary the court with analyzing each of the other cases to show wherein they do not apply to the case at bar we respectfully submit that a most casual reading of each and every one will disclose that they are not in point. Suffice it to say that the case of Iowa Central Ry. Co. v. Walker, 203 Fed. 685, has been discussed fully in subdivision I. of this brief and the remaining cases are either ones in

which the doctrine of last clear chance was never invoked at any stage of the proceedings or they are cases in which under their facts there was lacking the element of discovery in a place of peril and no failure to use every precaution possible to avert the injury existed.

Plaintiffs in error have failed to distinguish the case at bar from the principles of the cases they rely upon. The point upon which most, if not all of the cases cited by plaintiffs in error, turn is that the negligence of plaintiff continued up to the very moment the injury was inflicted. In the case at bar, it can hardly be said for an instant that David Clement, Jr., was acting negligently during any portion of the time that he was being pushed and dragged along the ground and track, either in the wagon or when he fell out and was rolled and dragged by the wheels of the engine and later run over by the wheels of the cars that passed over his body, eventually crushing his head. His negligence, under the authorities cited from the Supreme Court of Montana and this Court, ceased at the time he got upon the track, and the concurrence ceased there. The engineer, Woods, states that when he saw there was a possibility the driver would not stop he threw the engine into emergency at a point distant 75 feet from the crossing. It is most respectfully submitted that the failure of the engineer to stop the train after he saw Clement in a place of peril and the rushing down upon him with the train, colliding with the wagon and shoving it 250 feet beyond the point of contact with the wagon, traveling 325 feet in all after discovery, were all acts of negligence which occurred after David Clement, Jr., was discovered in a place of peril, and the judgment should be affirmed.

Just one word more as to the space in which that train, running at a rate of five or six miles an hour, could have been stopped in. The jury undoubtedly believed, as they had a right to believe, that the testimony given by plaintiff's witnesses was true and that the train could have been stopped within fifteen or thirty feet. As has been well said by an eminent trial judge before whom we have practiced, a jury does not have to believe a thing merely because someone has testified to it, and a jury should judge things not by some unknown or mysterious rule, but as men of common sense. So it is no wonder the jury preferred to believe the witnesses for defendant in error rather than those hypothetical gentlemen who, after indulging in dissertations on the co-efficiency of friction, said it would be a distance of all the way from one to two hundred feet, after an emergency application of the brakes before the train in question could be stopped. A reading of many of the cases cited in the briefs in this case will show that in hardly any was there such a thing as a claim that it took such a remarkably long distance in which to stop a train going at six miles an hour. In the case of Neary v. N. P. Ry. Co., 97 Pac. 946, 37 Mont. 461, in the course of the opinion the Supreme Court of Montana said:

> "This train consisted of nine cars and was about 600 feet in length. By the application of the air brake, such a train could be stopped within 250 or 300 feet when going at the rate of 25 or 30 miles per hour. If going at the rate of 6 miles per hour, it could be stopped within a distance of 6 feet."

So, after all, the remarks of counsel for plaintiffs in error trying to discredit the testimony of the witnesses who said it

could be stopped within fifteen or thirty feet are wholly uncalled for. The negligence of plaintiffs in error in failing to stop the train in time to avert the accident after the discovery of deceased in a place of peril is conclusively shown by the fact that the train ran a distance of 325 feet after the discovery. Woods says he applied the emergency 75 feet before he struck him and Glover testifies that by actual measurement the wagon was 255 feet from the crossing. (Tr., p. 43.)

IV.

INSTANTANEOUS DEATH.

Under this heading, plaintiffs in error attempt to show by their version of the evidence that David Clement, Jr., died instantaneously. After considering their argument briefly, we will show that the trial court did not err in refusing a directed verdict for plaintiffs in error or entering a judgment on the verdict returned by the jury.

The first case cited in the brief of plaintiffs in error, Railroad Co. v. Pendergrass, 69 Miss. 425, is one that unfortunately we have not access to. A reading of the quotation, however, on page 37 of the brief shows that the facts were different from the case at bar in that the Mississippi court says the deceased was run over and ground to pieces. There evidently was no pushing and dragging of deceased along and over the track for a distance of from fifty to one hundred feet as Clement, Jr., was. Hence the case is one that can hardly be said to be in point.

The case of Dillon v. Great Northern Ry. Co., 38 Mont.

485, 100 Pac. 960, has no application to the case at bar, for the reason that the opinion shows that the case was tried upon on agreed statement of facts, which among other things stated:

> "and by reason of said collision, the said Thomas Dillon was instantaneously and immediately killed, and *did not live or survive for a second of time after said accident;*"
>
> (Italics ours.)

We have no such condition of the evidence in the case under consideration. Indeed, the Dillon case, supra, was based upon Sections 5251 and 5252 of the Revised Codes of Montana of 1907, while the case at bar is brought under Section 6494 of said Codes.

The case of Lobenstein v. Whitehead & Kales Iron Works, 146 Mich. 294, cited by counsel for defendant in support of their contention, that the plaintiff died instantaneously, was brought under what was known as the "Death Act" of the State of Michigan, and not under a survival statute like the one under consideration in the case at bar.

The evidence adduced in the Lobenstein case was as follows:

> "Q. Was he dead when you went down? A. No.
>
> Q. How long did he live? A. Why I could not tell you how long he lived.
>
> Q. How do you know he was alive? A. He was down there breathing, and he must have been alive.
>
> Q. Was he conscious? Could he talk? A. No, he could not talk."

Defendant's attorney:

> Q. You know he lived about two hours after that, don't you? A. I don't know how long he lived.

Thereupon a motion for a directed verdict was made by defendant upon the ground that the defendant did not die instantly, and the Supreme Court of Michigan said:

> "Upon the question of whether death was instantaneous within the meaning of that term and referring to the manner in which the question was treated by the trial court we are of opinion that the court would not have been warranted in directing a verdict for the defendant upon that ground."

We take it that the court merely meant that it was a question for the jury.

This "Death Statute" in Michigan is in no wise similar nor is the cause of action granted by it like that given by Section 6494 Revised Codes of Montana. And a most casual examination of the decisions of the Supreme Court of Michigan will show that that court, appreciating the fact that instantaneous death was almost an unheard of occurrence, has held that deaths occurring many minutes, hours and even a day after an accident were instantaneous deaths.

The case of West v. Detroit, 123 N. W. 1101, was likewise under the Michigan Death Statute, and is not applicable.

The case of Ely v. Detroit United Ry. Co., 127 N. W. 259, was brought on two counts, one under the death and one under the survival statute. The court merely held that there was error in compelling plaintiff to elect under which count a recovery was sought.

The apology of plaintiffs in error for citing the case of Moyer v. Oshkosh, 139 N. W. 378, is well offered, for the

reason that the question of instantaneous death was based upon a claim presented to the city in which it is stated that deceased was precipitated into the river and "then and there drowned." The Supreme Court of Wisconsin says this claim was "unhappily worded." The theory of the case is entirely unlike the case at bar and is no precedent for the question under consideration.

The Corsair Case (Barton v. Brown) 145 U. S. 335, and the case of Cheatham v. Red River Line, 56 Fed. 248, are ones in which the courts held that the sufferings of drowning persons are contemporaneous with death; the Supreme Court of the United States in the Corsair case says too unsubstantial to estimate damages upon.

The case of Maher v. Boston & O. R. Co., 32 N. E. 950, was one in which the question of instantaneous death was left to the jury and the jury found the death to be instantaneous. This is precisely our contention, that the question was properly left to the jury and the jury having necessarily found it was not instantaneous, and there being evidence to support such finding, the judgment should not be disturbed.

Let us next consider the statement of counsel for plaintiff in error that they do not find a great number of reported decisions on the precise point and that the Corsair case is the only instance, so far as they have found, in which the Supreme Court of the United States touched the matter.

The examination we have made of the law discloses not only that there are cases other than the ones counsel for plaintiff in error rely upon, but the great weight of authority is to the effect that the question as to whether deceased was killed instantaneously or not is one for the jury.

Our contention is that David Clement, Jr., was not killed at the crossing when the engine first collided with the wagon in which he was riding, but that he was pushed along in the wagon and fell out some distance from the crossing, was pushed along in the wreck or by the wheels of the engine, ran over by the wheels of the engine, tender, or cars at a considerable distance from the crossing. The testimony shows the first sign of blood was at least fifty feet from the crossing. How any one can argue that he received the fatal injury, to-wit, the crushing of the skull, while he was seated in the wagon, is beyond our comprehension. The finding of the blood, legs, arms and brains in the order mentioned shows that the injuries occurred in that order, after he was thrown about in the wagon and hurled from it some distance from the crossing.

To believe the contention of counsel for plaintiffs in error that the fatal crushing of the skull occurred at the crossing would necessitate attributing to the locomotive almost human acrobatic skill, as his head was certainly several feet above the level of the railroad tracks, and blood would have appeared in the wagon and on the crossing.

This action is the common law action which the minor had for the injuries he received, and which accrued to him at the time of his injuries and remained available to him until the instant of his death, and which the administrator of deceased minor now seeks to prosecute.

At common law such a right of action literally died with the decease of the injured party.

But section 6494 Revised Codes of Montana provides that

an action or cause of action shall not abate by the death of a party, etc.

Melzner v. Northern Pac. Ry. Co., 127 Pac. 148.

The only questions then in this case are: Was the death of David Clement simultaneous with the injury, and was the evidence in this case sufficient to warrant the jury in finding under proper instructions from the court that the death was not instantaneous?

No error is predicated upon any of the instructions given the jury by the trial Court and consequently they are presumed to have stated the law applicable to the facts in this case correctly.

In the case of Whitford v. Panama Ry. Co., 23 N. W. 486, Judge Comstock sensibly declared:

> "The death may be sudden; in common language, instantaneous, but in every fatal casualty there must be a conceivable point of time, however minute, between the violence and the extinction of life. That period may be a year, or it may be less than the shortest known division of time."

The remark, a simple recital of an obvious fact of science, is important in that it signifies that the legislature could not have meant to pass a statute which, as is contended, means that a recovery should not be had in a case which the accepted truths of science show never does, in fact, occur. The Supreme Court of South Carolina likewise, though saying the statute was a survival statute, held in Price v. Richmond R. R. Co., 26 Am. St. Rep. 700, that it permitted a recovery whether the death was instantaneous or lingering.

Reed v. Northeastern R. Co., 16 S. E. 289.

In Kentucky a like conclusion was reached.

Givens v. Kentucky C. R. Co., 12 S. W. 257.

The Supreme Court of Iowa has passed upon the question here involved in Kellow v. Central Iowa Ry. Co., 23 N. W. 740, saying:

> "The finding is that his death was of the nature commonly known as "instant death." A death is not necessarily instantaneous in fact because it is of that nature. If the injury which caused the death is necessarily fatal and death results in a few moments from it, it would no doubt be commonly called instant death; but as the person survived the injury for that brief period it cannot be said that death was instantaneous. The evidence shows that Carter survived the injury for a few moments."

On a rehearing of this case it was said:

> "We have examined the evidence in the record, and are satisfied that without conflict it establishes the fact substantially as stated in the opinion. It shows beyond controversy, we think, that the death was not simultaneous with the injury. We concede that the time between the two occurrences was brief, perhaps not to exceed three to five minutes. Our holding on the question considered is based, however, not on the length of time that Carter survived the injury but upon the fact that he lived after it occurred."

Kellow v. Central Iowa Ry. Co., 27 N. W. 466.

In the case of Worden v. Humeston & S. R. Co., 33 N. W. 630, the Supreme Court of Iowa held it made no difference whether the injured died instantly or not.

See also Connors v. Burlington C. R. & N. Ry. Co., 32 N. W. 465.

A very interesting case upon the subject under discussion

is that of Naurse v. Packard, 128 Mass. 307. In this case the deceased was last seen alive in the mill ten or fifteen minutes before the accident; three-quarters of an hour after the accident his dead body was found twenty feet below where he had last been seen, with no marks of injury upon it, surrounded by loose grain over his head. There was expert evidence that he died of suffocation and that a person so situated would retain consciousness from three to five minutes. Held that the jury were warranted in finding that the death was not instantaneous.

In an action for injury to plaintiff's intestate by suffocation in a steamer in which the hatch had been closed to check fire, from the position of the body it was to be inferred that his death was not instantaneous and that he lived in a state of conscious suffering for a greater or less time.

Held to be proper case for the jury.

Pierce v. Cunard S. S. Co., 26 N. E. 415.
Carolina C. J. Ry. Co. v. Shewatter, 161 S. W. 1136.
Belding v. Black Hills R. Co., 3 S. D. 369; 53 N. W. 750.
Brown v. Chicago Ry. Co., 77 N. W. 748; 78 N. W. 771; 44 L. R. A. 579; 70 N. W. 170; 37 L. R. A. 333.

A case almost on all fours is the case of Martin v. Boston & Maine R. R. Co. (Mass.), 56 N. E. 720.

Plaintiff's decedent was in defendant's employment as a brakeman and switchman, at the time of the accident; decedent attempted to descend from a car on the end of the train when it was about 270 feet from and backing towards the switch, and his feet caught about two feet from the ground, until the car had gone twenty feet, when his foot was loosened

and after being pushed one hundred sixty feet further he was run over and instantly killed. There was evidence that the train was going at a rate of four or five miles an hour and that a train of its kind should be stopped within the length of a car and a half.

The court said:

> "The plaintiff concedes that if there was not conscious suffering the action, which is brought under the Employer's Liability Act, by persons dependent on the deceased cannot be maintained. It seems to us plain that there was conscious suffering, although the second in which the deceased was killed was separated, as a point of time, from the second in which he fell from the car, the accident was one accident from its beginning to its swift and unfortunate end. The same causes were operating all the time, which was exceedingly brief, only a few seconds. We do not see how the second in which the deceased was killed can be separated from the second in which he fell, and from the seconds which intervened between that time and the death, so as to say death was without conscious suffering."

Another case in point is that of Finnigan v. Fall River Gas Works, (Mass.), 34 N. E. 523.

This was a case where deceased met his death from becoming asphyxiated.

The court said:

> "There was evidence for the jury, whatever may be thought of its weight, that the deceased had a period of conscious suffering before death. One of the doctors testified to that effect. To be sure he had not had any experience of this kind of asphyxiation personally or with patients, but his general competency as an expert seems not to have been questioned. . . . We see no suffi-

cient ground for saying that the testimony admitted in this case could be treated as furnishing no evidence of the fact."

In the case of St. Louis I. M. & S. Ry. Co. v. Stamps (Ark.), 104 S. W. 1116, the court said:

"The next point raised is that there was instant death, and hence compensation for pain and suffering prior to death cannot be sustained. The facts testified to by eye witnesses were that the steam cylinder of the locomotive struck Mr. Kirby on the hip and knocked him from the bridge, and he fell on an iron girder parallel with the bridge; that he struck this girder with some force, enough to make him bounce, and then he dropped his flag, which fell on one side of the girder and he on the other; and that as he fell from it, he drew up his hands close to his breast. Another witness saw his left arm raised as he was falling. The bridge was twenty or twenty-five feet above the water. The river was swift and deep at this point. He was not seen after his fall. The train was making so much noise that it is not known whether he made an outcry or not. When the body was found some two months later there were indications of bruises on the head. For a recovery to be had for pain and suffering there must be some appreciable interval of conscious suffering after the injury and before the death. G. L. I. M. & Son. Ry. Co. v. Dawson, 68 Ark. 1; 56 S. W. 4."

"In Taxarkan Gas Co. v. O. R. R., 59 Ark. 27; ..... S. W. 66; 43 Am. St. Rep. 215, it was said:

" 'That the struggles of deceased were of the briefest character. He cried out twice, and his hands were burnt and drawn up by wires. He died almost instantly; yet in that case a recovery for conscious pain and suffering was sustained.' There is a conflict in the authorities as to whether in case of death by drowning there can be a recovery for conscious pain and suffering. See Railroad Co. v. Dawson, supra. It cannot be said, in view of the evidence above detailed, that there was not a substantial

interval of conscious mental and physical suffering from the time Mr. Kirby was struck by the locomotive on the bridge until he met his death in the river below."

Another case very similar to the one at bar is the case of St. Louis, I. M. & S. Ry. Co. v. Dawson (Ark.), 56 S. W. 46, in which plaintiff's decedent while crossing the railroad track was struck by a locomotive, run over and killed. She was between six and seven years of age. She was seen on the track a short distance in front of the engine, but no witness saw her at the time she was struck. After the train passed over her, she was discovered lying on the track. She had been pushed along the track and looked like a bundle of rags. One of her legs have been cut off above the knee, and a portion of the entrails protruded, and the skull was broken. Those who reached her first testified that she did not move, and did not appear to be conscious, though she was seen to breathe. Some one called her "Marie" but she never spoke. She gave a couple of gasps and in a moment or so was dead.

The court said:

"We are also of the opinion that a right of action survived to the personal representative; for the survival of the action depends upon whether the injured child lived after the act constituting the cause of action, and it is not material whether she was conscious or not. If she lived after her right of action was complete, this right, which she possessed, passed by virtue of the statute, to her personal representative."

Davis v. Railway, 53 Ark. 123; 13 S. W. 801; 7 L. R. A. 238.

Hollenbeck v. Railroad Co., 9 Cush. 478;

Mulchahey v. Car Wheel Co., 145 Mass. 281; 18 N. E. 106.

The Corsair case cited by counsel, 12 Sup. Ct. 949; 36 L. Ed. 727, did not touch upon the point here involved and nowhere did the court attempt to go farther than to determine that the point of time between the injury and the death was so short that no recovery could be had for conscious suffering. The question here involved is, did the action survive?

In the Corsair case a person was drowned. The boat struck the bank of the Mississippi and in ten minutes sunk. It was contended that the deceased suffered great mental and physical pain and shock and endured tortures and agonies of death.

The court said:

> "Had she suffered bodily wounds and bruises from the results of which she lingered and ultimately died it is possible that her sufferings during her illness would give a separate cause of action. . . . Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages."

Reviewing briefly the evidence in this case we find that the train was moving at the rate of about five or six miles an hour (Tr., p. 50); that when the wagon was struck it was pushed along the track approximately 250 feet (Tr., p. 43). The body of the plaintiff's decedent was approximately 75 or 145 feet west of the crossing (Tr., pp. 29, 54), between the tracks (Tr., p. 30). When the boy was picked up he was merely gasping a little, frothing at the mouth as if in his last struggle for life (Tr., p. 53). The hand of the boy was picked up ten feet east of the body (Tr., p. 54). Blood was found on the track between the place where the arm was picked up and the body. The boy was riding in an enclosed milk wagon. The wagon was caught on the foot board run-

ning along the rear end of the engine, and across the rail, and slid along on the rail ahead of the engine (Tr., p. 28).

The case of Melzner, Admr. of Omer Hadox, v. Northern Pacific Ry. Co., 127 Pac. 148, was a case almost on all fours with the case at bar. In that case the Supreme Court of this state said:

> "We preface our remarks by saying that we think the evidence sufficient to show that Omer Haddox survived his injuries for an appreciable length of time, and therefore had a cause of action for damages for the injuries sustained, assuming for the present that his injuries were caused proximately by the negligence of the defendant."

The facts in this case are not set forth in the decision, but we quote from the record on appeal as follows:

> "He was struck by the pilot beam. I should judge it struck him in the back. He seemed to roll like a ball through the air; he was away clear off the ground; after the engine hit the boy I ran down where he lighted; after I got there the boy just gasped once or twice—kind of opened his mouth and closed it."

In the case of Beeler v. Butte & London Copper Co., 110 Pac. 531 (Mont.), the Supreme Court of this state said:

> "On the morning of the day above referred to, Edwin Beeler, a pumpman in appellant's employ, was sent by one O'Neal, his boss, to prime a pump at the 'Four Hundred' and after that proceed to the 'Six Hundred' and shut off the steam line there. He proceeded to the 'Four Hundred,' was there about 15 minutes, primed the pump, passed some remarks with one Simmons, took the cage, rang for the 'Six Hundred' and descended. About half an hour after this O'Neal, finding the steam line still open, signaled from the bottom of the shaft for the cage, and, not receiving it, he ascended the shaft by means of the ladder, arrived at the 'Six Hundred,' and there found

Beeler dead, bound tight between the lower edge of the north wall plate and the upper edge of the bottom of the cage, the floor of the cage being about four inches up on the wall plate. The cage was rigid, and it was necessary to lower it to remove the body; 'it seems to have him by the breastbone and the lower short ribs, square . . . he was bound in that tight that there wasn't a tremor in cage at all.' His body was held almost erect, his head thrown slightly backward, the hat still on it; both hips were below the floor of the cage but the left leg was drawn up so that the kneecap was above the floor of the cage; his clothing was drawn or bunched sharply upward; he had been dead some time. There was no blood, except a little froth from the mouth, nor marks of injuries except crosswise at the point of the breastbone, which were not cuts but a crush; the lower ribs were broken at that point; there were no wounds on the legs or around the region of the hips, front, or rear or sides. The internal organs of the lower abdomen, everything in the abdominal cavity seemed to be pushed up. No one saw the accident or heard any outcry. At the time of the accident Beeler was 27 years old, in good health, sober, steady, and industrious, competent in his business, capable of earning $150 a month, and with a life expectancy of 36 years. The injuries sustained by him were such as to totally incapacitate him and to cause his death. It does not appear that death was instantaneous, but, on the contrary, we think there is sufficient competent evidence in the record to support the conclusion that he lived an appreciable time after the injuries were sustained."

Counsel say that Chappel's testimony was contradicted and that he was impeached, but our contention is that while the jury might disbelieve the evidence given by Chappel, it was a question for the jury, and the Court should not say as a matter of law where there is a conflict in the evidence that the jury could not believe one witness in preference to an-

other, no matter how much the Court might be impressed with the truth or falsity of it. The evidence shows that the wagon was pushed along ahead of the engine, and the boy must have dropped out on the track and was caught up, apparently by the wheels and was dragged some distance on the track. Apparently an arm was taken off at one time, a leg at another, then another leg, and lastly the head crushed. That was the order the various parts of the body were found in.

The Supreme Court of Massachusetts in Hollenbeck v. Birkshire, 9 Cush. 478, said:

> "We think the accruing of the right of action does not depend upon intelligence, consciousness or mental capacity of any kind on the part of the sufferer. A right may accrue by operation of law to one in extremis, when it requires no act or assent or even consciousness on his part. Should a person who is heir of his father be in the lowest condition, but still heir at the moment of the death of his father, the descent would be cast on him, although he might never know it."

Quoting again from a Massachusetts court:

> "Instantaneous means generally occurring in an instant, or without any perceptible duration of time. . . . If a blow upon the head produces unconsciousness and renders the person injured incapable of intelligent thought or speech or action, and so remains for several minutes and then dies, we think his death may very properly be considered immediate, though not instantaneous. Of course an instantaneous death is an immediate death, but we have not supposed that an immediate death is necessarily and in all cases an instantaneous death. . . . Such a discrimination may be regarded by some as excessively exact or nice, and therefore hypercritical, but in stating legal propositions it is impossible to be too exact, Tulley v. Pittsburg R. Co., 134

Mass. 499. In paraphrasing an opinion from Iowa 'All death is not necessarily instantaneous in fact because it is of that nature. If the injury causing the death is necessarily fatal, and death results therefrom in a few moments, while it would commonly be called an instant death, still if the person injured survives the injury for a brief period, it cannot be said that the death is instantaneous. It is immaterial that the period of time between the injury and death is short. If the injured person survives the injury but for a single moment, the cause of action accrues to him as certainly as if he lives for a month or a year thereafter."

Kellow v. Cent. Iowa R. R. Co., (Iowa), 68 Iowa 470.

A jury might well say that consciousness is evidenced by the opening and closing of the mouth more often than in any other way. We accept this as a fact, when, at the bed of death, the departing having not sufficient strength to make audible sounds, but are attempting to speak. Whether there is consciousness coupled with bodily injury there is pain and suffering.

In the recent case of Myers v. Pittsburg Coal Co., 233 U. S. 184, the deceased was found lying in the middle of the track with his head toward the motor and his cap upright, the body was badly torn and mangled before the motor car could be stopped; deceased's tongue was found to be moving, but he died shortly from his injuries. A recovery was had in the Circuit Court of Pennsylvania and a reversal had in the Circuit Court of Appeals.

The Supreme Court of the United States said in reversing the Circuit Court of Appeals:

"The opinion of the circuit court of appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death,—whether by contact with wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train, or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark, and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and, in the absence of some more accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in the trial court. Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them, the verdict and judgment of the district court must be affirmed.

"That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of the ways charged in the petition. Considering the testimony, as it must be considered in determining questions of this character, in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car, the operator being unable to see his body

upon the track because of the want of efficient light in the entry or in the motor car. We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which, when fairly considered, might sustain the verdict. See Humes v. United States, 170 U. S. 210, 42 L. Ed. 1011, 18 Sup. Ct. Rep. 602."

This case is undoubtedly the latest expression of the law on this subject and coming from the court it does entitles it to the greatest consideration. The true rule undoubtedly is that the question is one properly left for the jury and by its verdict the jury having found that Clement survived an appreciable length of time, this court cannot set aside the verdict if from any view of the testimony such verdict finds support.

We respectfully submit that the jury could easily have found from the testimony that Clement was even after falling out of the wagon rolled, pushed or dragged along the ground by the wagon as it was fastened on the engine's running board, or by the wheels of the engine or wheels of the car, or all of these.

The trial judge considering the motion for a new trial rightly held under the authorities cited, supra, and especially the last one from the Supreme Court of the United States, that if under any view of the testimony the verdict could be sustained it should be. The jury evidently considered and they had a right to do so, that no evidence of the blood was seen for fifty feet from the place of collision; and the finding of the brains beyond the severed arm and legs, was sufficient to

show that Clement, Jr., lived after the collision an appreciable length of time, and the cause of action survived. The living of deceased for the briefest moment is a sufficient survival, and the judgment should be affirmed.

Respectfully submitted,

B. K. WHEELER,
HOMER G. MURPHY,
A. A. GRORUD.

Service of the above and foregoing Brief is hereby acknowledged, and copy thereof received, this 7th. day of May, A. D. 1915.

Geo. H. Shelton.
Fred J. Furman.
A. J. Verheyan.

Counsel for Plaintiffs in Error.